

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 204 of 2006 ()

**AGAINST THE JUDGMENT IN SC 158/2004 of ADDITIONAL SESSIONS COURT
FASTTRACK (ADHOC), MANJERI DATED 16-01-2006**

IN CP 2/2004 OF JUDICIAL FIRST CLASS MAGISTRATE, NILAMBUR

APPELLANT(S)/ACCUSED IN S.C::

**DIVAKARAN, S/O. KOCHUKUNJU,
CHUNGATHARA AMSOM, KUNIPPALA DESOM, NILAMBUR TALUK.**

**BY ADVS.SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
SRI.AJITH MURALI**

RESPONDENT(S)/COMPLAINANT IN SC::

**STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 204 of 2006

Dated this the 15th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) of the Abkari Act and he was found guilty. Therefore, he was convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of six months. Set off as per law was allowed.

2. The incident is said to have occurred on 15.11.2001. During that period, PW1 was the Excise Inspector of the concerned station. On that day, at about 1.00 O'clock in the noon, while he and his team of officers were on patrol duty, when they reached near the house of the accused, they saw the accused coming from the opposite direction carrying a sack. On seeing the excise officials, he tried to turn around. He was immediately intercepted and the sack was examined. It was found to

contain two bottles having a capacity of 1½ litre and they contained some liquid. By smell and taste, they realized that it was arrack. Both the bottles were seized and the accused was arrested as per Ext.P1 arrest memo. Ext.P2 is the seizure mahazar prepared. From one of the bottles, 180 ml was taken as sample and that was sealed and labelled in accordance with law. PW1 returned to the station and registered crime as per Ext.P3 occurrence report. He prepared the property list namely Ext.P5 and the forwarding note is Ext.P6. He produced the articles, the accused, and documents before the court on the very next day. PW4 conducted investigation in the case. He recorded the statement of witnesses, obtained Ext.P8 report and filed final report before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Manjeri under Section 209 of Cr.P.C.

after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-I (Adhoc), Manjeri, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offence punishable under Section 8 (1) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and had Exts.P1 to P9 marked. MOs 1 to 3 were got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. Presumably acting on the evidence of PWs 1 and 2 and the contemporaneous documents namely, the seizure mahazar etc., the court below was impressed with the prosecution case and found that the accused had committed the offence. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant pointed out that a memo has been filed by the Investigating Officer saying that one of the witnesses was not traceable and that shows that in all probability, there were no such witness at all to prove the documents. It is further pointed out that sample was taken only from one of the bottles and there is no mention either in the mahazar or in the evidence of PWs 1 and 2 that the other bottle was similar in nature which contained similar liquid. The learned counsel went on to point out that the prosecution gets support only from the official witnesses and there is no independent witness to support the prosecution case. It will be hazardous to venture a finding of guilt based

on the evidence of official witnesses who are interested witnesses. The learned counsel went on to point out that there is no corroborative piece of evidence and the benefit of doubt should go to the accused.

10. The learned Public Prosecutor pointed out that the evidence of PWs 1 and 2 is clear and categoric regarding the activity carried on by the accused and the search and seizure by PW1. Both of them speak about the various steps taken by PW1. The learned Public Prosecutor went on to point out that the contemporaneous documents further strengthen their versions. Even assuming that sample is taken only from one bottle and it turns out to be ethyl alcohol and even if the quantity in the bottle from which the sample was taken is very less, still the offence will be attracted. In these proceedings, we are not concerned with the quantity of the liquid seized. The learned Public Prosecutor went on to point out that the court below has considered all these aspects in considerable detail and found

the accused guilty. There are no grounds made out to interfere with the conviction and sentence.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is felt that the learned Public Prosecutor is justified in his submission that no interference is called for.

12. The evidence of PWs 1 and 2, as rightly pointed out by the learned Public Prosecutor, confirm each other and they are uniform and consistent in their version regarding the various aspects. It is not disputed that PW2 was along with PW1 at the time of patrolling. Added to this is the fact that Ext.P2 mahazar is prepared at the place of occurrence. That contains all the necessary details which are spoken to by PWs 1 and 2 in the box. The prompt production of the accused, the documents and the materials before the court go a long way in establishing the veracity of the prosecution case. If on the basis of the above facts the court below

thought that the offence had been made out, it will not be found fault with.

13. Even though PWs 1 and 2 were cross examined at length, nothing could be brought out from their evidence. The fact that one of the attesting witnesses could not be traced out, will not help the accused much. The evidence of other witnesses are sufficient and there is no need for further evidence.

14. The criticism that PWs 1 and 2 being official witnesses, they are interested witnesses and their evidence cannot be accepted unless it is corroborated is without any basis whatsoever and there is no rule of law that official witnesses evidence cannot be accepted. By way of abundant caution, the court looks for corroboration. But that is not a rule. In the case on hand, PWs 1 and 2 give a uniform version of the incident.

15. Even though PWs 1 and 2 were cross examined at length, nothing could be brought out from their evidence in

favour of the accused. Further, if at all any corroboration is required, that is available from Ext.P2, the mahazar prepared at the place of occurrence.

16. The contention raised is that there is no seal on the mahazar. Even assuming that there is no seal on the mahazar, that does not affect the merits of the case because Ext.P2 mahazar is a contemporaneous document prepared without any lapse of time guaranteeing that what is stated therein is true.

17. Merely because sample has been taken only from one of the bottles does not mean that the offence is not made out. If as a matter of fact, the sample taken is found to contain ethyl alcohol, irrespective of the quantity, the petitioner is liable. Ext.P8 is the FSL report in this case. That shows the sample contained 26.70% by volume of ethyl alcohol. It is therefore abundantly clear that the court below was justified in coming to the conclusion that the offence has been made out. The conviction is rightly entered into.

18. Faced with the above situation, the learned counsel for the appellant contended that the incident occurred in 2001 and the appellant was 67 years of age at that time. 14 years have elapsed. Considering the quantity of articles seized, the sentence imposed is on the very high side and disproportionate to the offence committed by the accused.

19. After having given anxious consideration to various aspects, it is felt that there is considerable force in the above submission.

20. Considering the present age of the appellant and also the fact that he had undergone pre-trial detention and also the quantity of article seized, it is only proper that the sentence awarded to be proportionate to the offence committed.

In the result, while upholding the conviction of the accused for the offence punishable under Section 8(1) of the Abkari Act, the sentence imposed is set aside and instead he

is sentenced to suffer simple imprisonment for a period of one month and to pay a fine of ₹1 lakh, in default of payment of which he shall suffer simple imprisonment for a period of two months. Set off as per law will be allowed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge